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Minnesota Court of Appeals Case No. A05-768

Minnesota District Court Case No. CR-0

UNITED STATES SUPREME COURT

OCTOBER 2006 TERM

State of Minnesota, Respondent

Vs.

Eric Maynard Scwhichtenberg, Petitioner

On Petition for Writ of Certiorari to the United States Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is it a violation of the Fourth Amendment to the United States Constitution to charge a driver with exercising his constitutional right to withhold consent to search of his breath, blood or urine?

PARTIES TO THE PROCEEDING

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CITATION OF OPINIONS

The Blue Earth County District Court's judgment is unreported, and reproduced in the Appendix at A11 . The opinion of the Minnesota Court of Appeals, filed on February 28, 2006, is unreported, and reproduced in the Appendix at A4. The Order by the Minnesota Supreme Court denying Petitioner's Petition for Review of Decision of the Court of Appeals, dated May 16, 2006, is unreported, and reproduced in the Appendix at A2.

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BASIS FOR JURISDICTION IN SUPREME COURT

The Blue Earth County District Court entered judgment against Petitioner on February 9, 2005. The Minnesota Court of Appeals' decision was filed on February 28, 2006, in an unpublished opinion. On May 16, 2006, the Minnesota Supreme Court denied Petitioner's Petition for Review of Decision of Court of Appeals. the jurisdiction of This Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV to the United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

Minnesota Statute §169A.20, subd.2.

"Refusal to submit to chemical test crime – It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)."

Minn.Stat.§169A.20, subd. 2 (2005).

STATEMENT OF THE CASE

A. FACTS:

On July 24, 2004, Petitioner was operating a motor vehicle in Blue Earth County, State of Minnesota. Following a tip by a citizen regarding a possible intoxicated driver, Blue Earth County peace officers responded to a convenience store where the reported vehicle had parked. The officers pulsed in behind the vehicle, and made contact with the driver, Petitioner herein. After conducting various field sobriety tests, Petitioner was arrested for driving while under the influence of alcohol.

Upon arrival at the Blue Earth County Law Enforcement Center, Petitioner was read the Minnesota Implied Consent Advisory. As part of the advisory, a peace officer is required to inform the driver that refusal to submit to a test to determine alcohol concentration is a crime in the State of Minnesota. In addition to making refusal a crime, under Minnesota law, a driver who refuses to submit to a test o determine alcohol concentration loses his or her driver's license for a period of

one year. After reading the advisory, the peace officer requested that Petitioner submit to a breath test. At first, Petitioner agreed to submit to a test. Later, Petitioner refused to submit to that test. As a result, Petitioner was charged with Second Degree Refusal to Submit to Testing, in violation of Minn.Stat.§169A.20, subd. 2 and Minn.Stat. §169A.25, a gross misdemeanor which carries a maximum penalty of one year in jail an/or a $3000.00 fine. The Petitioner also lost his driver's license for a period of one year.

B. PROCEDURAL HISTORY

On October 19, 2004, a contested evidentiary hearing was held before The Honorable Norbert P. Smith, Judge of District Court, Blue Earth County, State of Minnesota. At said hearing, Petitioner raised the issue that it is unconstitutional to charge a driver with exercising a constitutional right to withhold consent to search. Therefore, Petitioner made a motion to dismiss the refusal charge under those grounds. On January 7, 2005, The Honorable Norbert P. Smith issued an Order, denying Petitioner's motion, stating in relevant part, "[t]he defendant challenges the constitutionality of the Implied Consent Advisory

...The defendant also asserts that Minn.Stat.§169A.20, subd.2, violates the defendant's Fourth Amendment right against unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, substantive due process, and the right to privacy". District Court Order, P. 2-3, January 7,2005. The Court wrote, "[t]he defendant has failed to establish beyond a reasonable doubt that the refusal statute is unconstitutional. Therefore, the defendant's motion is denied". District Court Order, P. 4, January 7, 2005.

On April 18, 2005, Petitioner filed a Notice of Appeal to the Minnesota Court of Appeals, along with a Statement of the Case. In the Statement of the Case, Petitioner notified the Court of Appeals that the issue on appeal would be whether it is constitutional to charge a driver with a crime for exercising his constitutional right to withhold consent to a search under the Fourth Amendment to the United States Constitution. On February 28, 2006, the Minnesota Court of Appeals affirmed the District Court's Order. In its opinion, the Court of Appeals listed the issue as, "[a]ppellant challenges his conviction of refusal to submit to testing under Minn.Stat.§169A.20, subd. 2,

arguing that the statute is unconstitutional because it criminally penalizes appellate for exercising his constitutional right to withhold consent to a search, i.e., a breath test, when law enforcement has no warrant to take the test". The Court of Appeals ruled that, "[t]he state has a compelling interest in protecting its residents from drivers impaired by alcohol, and the statutory framework of implied consent set forth in Minn.Stat.§169A.20, subd.2, is a reasonable means to accomplish that objective. Consequently, the statute is constitutional, and the lack of appellant's verbal consent to the taking of the breath test did not violate his Fourth Amendment rights".

On March 30, 2006, Petitioner filed a Petition for Review of Decision of Court of Appeals in the Minnesota Supreme Court. On May 16, 2006, the Minnesota Supreme Court denied review, stating, "[b]ased upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of Eric Maynard Schwichtenberg for further review be, and the same is, denied".

REASONS FOR ALLOWANCE OF WRIT

The Petitioner respectfully requests the United States Supreme Court accept review of the decision of the Minnesota Court of Appeals, and the Minnesota Supreme Court's denial of further review. Because both the Minnesota Court of Appeals has decided an important question of federal law (i.e. Fourth Amendment searches and the criminalization of refusal to consent to a search) that has not been settled by this Court, this Court should accept this Writ of Certiorari.

In this case, Blue Earth County peace officers wanted to search Petitioner's breath to determine whether he was under the influence of alcohol. In this case, the Blue Earth County peace officers did not have a warrant to conduct the search of Petitioner. In this case, Petitioner did not consent to this search. In fact, he refused consent. Therefore, the question becomes whether the state has a right to charge a driver for exercising his constitutional right to withhold consent to a search.

Under Minn.Stat.§169A.20, subd.2, any person who verbally refuses to consent to a search of his person for evidence

of crime is guilty of a crime punishable by a more severe penalty than the crime of which he was originally suspected. In other words, the Minnesota Legislature has made it a crime to exercise the constitutional right to verbally withhold consent to search. In examining this statute, it is important to understand what it is, and what it is not. The statute is not civil which imposes consequences for non-compliance. It is not an administrative regulation of a valid licensing power. It is not an evidence-regulating provision. It is a criminal statute whose sole mission is to extract incriminating evidence upon pain of server punishment. It is a statute that says: when an individual obtains a license to drive in Minnesota, that person impliedly gives up his right to refuse consent to a search. Further, if that person reneges on that implied promise, not only will his license to drive be revoked for a period of one year, but the state will label that person a criminal, and imprison him regardless of whether he is guilty of any other offense.

To say that it is a crime to verbally refuse testing is quite different than providing that a driver's license will be revoked for that refusal. The latter is a civil, administrative

compulsion, well within the authority of the legislature. Because a driver's license is a privilege, not a right, it is constitutionally acceptable for a majority of society to claim that, as a condition of being able to continue driving, a citizen must relinquish his privacy to this extent. It is altogether a different matter to codify a law that dictates that a breach of this "implied contract" will have criminal consequences. As This Court wrote in Frost v. Railroad Comm'n, 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101 (1926), "[a]s a general rule, the state, having the power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions, which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution...may thus be manipulated out of existence".

Under established federal and state law, the taking of

blood, breath or urine from a driver suspected of driving while impaired is a search under the Fourth Amendment. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed. 639 (1989). It is equally established law that a search performed without a warrant is presumed unreasonable. Preston v. United States, 376 U.S. 364, 845 S.Ct. 881, 11 L.Ed. 777 (1964); Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.564 (1971). A warrantless search, however, is reasonable if it falls within a well delineated exception to the warrant requirement. Those exceptions are: 1) consent – Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed. 854 (1973); 2) search incident to arrest – Ker v. California, 374 U.S. 23, 83 S.Ct. 623, 10 L.Ed. 1027 (1963); 3) exigent circumstances with probablecause – United States v. Chadwick, 443 U.S. 31, 97 S.Ct. 2476, 53 L.Ed. 538 (1977), Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 908 (1966) ;4) hot pursuit – Warden v. Hayden, 387 U.S. 294, 87 U.S. 1642, 18 L.Ed. 782 (1967); 5) stop and frisk – Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968); 6) inventory search – Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 730 (1967).

These decisions provide a foundation and backdrop for our discussion herein. These decisions deal with the question of admissibility of evidence, or the exclusionary rule. However, the principles contained therein are germain to whether or not one can be prosecuted for verbally refusing to consent to a search. What is important about these decisions is that there is no exception to the warrant requirement based upon legislative enactment. As the Court in State v. Henning ruled, "[t]he police should not be allowed to define the reasonableness of their own conduct. Neither is the legislature empowered to redefine the constitutional parameters of police conduct". State v. Henning, 666 N.W.2d 369, 385 (Minn.2003). Thus, the legislature can neither regulate evidence, nor dilute the constitution's restrictions upon how that evidence is gathered. Statutes cannot undermine the constitutional protections enjoyed by United States citizens. Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed. 1 (1979). The burden is on the government to demonstrate the existence and applicability of an exception justifying a warrantless search. Bumper v. North Carolina, 381 U.S. 543, 88 S.Ct. 1788, 20

L.Ed.797 (1968). However, until now, a withdrawal of consent has never been made a crime. It can never be made a crime without standing a century of case law on its head. Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed. 297 (1991).

The government may, and should, address the "carnage" on our highways through drunk drivers. However, it must do so without doing carnage to the constitution and its time-honored protections. The government may attack drunk drivers, but in doing so, it may not attack fundamental liberties as guaranteed by the Bill of Rights and the Constitution. The government may certainly require consent to search as a provision of obtaining a driver's license. The government may certainly revoke a driver's license for refusal to consent. The remedy for withdrawn consent is and always has been, the loss of that license. However, the legislature cannot make a driver's decision to exercise a constitutional right to verbally withhold consent to a search, in and of itself, a crime. If the government is permitted to do so, then the time-honored constitutional rights of our citizens would be rendered meaningless.

This Court has ruled that an individual has the

constitutional right to verbally withhold consent to a search. To criminalize this verbal conduct is contrary to that principle. The Petitioner is not arguing that the government cannot still effectuate a search. If the government has a warrant, or a valid exception thereto, a search can still be conducted. The Petitioner is simply asserting that when a citizen verbally withholds consent to a search, the matter is over unless one of those exceptions apply. To criminalize Petitioner's verbal withholding of consent to search his person is analogous to a number of scenarios that are equally unconstitutional. First, the government surely cannot charge a homeowner with the crime of "refusal" if that homeowner verbally withholds consent to search after a request by a peace officer. Second, the government surely cannot charge a driver with "refusal" if the person is stopped for speeding and, thereafter, the police request consent to search the vehicle and the driver declines. Third, the government surely cannot charge a pedestrian with "refusal" if that person verbally withholds consent to a request to search his personal belongings. These scenarios are no different than charging a driver with "refusal" for verbally withholding consent

to search his breath, blood or urine.

Rather than charging a driver with a crime for exercising a constitutional right to withhold consent, there are other means for which the government can limit the "carnage" due to drunk drivers. Before a search for breath, blood or urine can be permissibly made, an officer still must have probable cause that the driver is under the influence. Under Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 908 (1966), the officer can require a search of that person without a warrant so long as there is probable cause. Therefore, the government can obtain evidence of intoxication without criminalizing a constitutional right. To claim that criminalizing the constitutional right to withhold consent effectively aids the government in attaining its goal of limiting drunk drivers is disingenuous.

Based on the reasons stated herein, the Petitioner respectfully requests the United States Supreme Court accept this Writ of Certiorari.

Dated: 8/11/06

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APPENDIX

1. Minnesota Supreme Court Order.....A1

2. Minnesota Court of Appeals Decision.....A3

3. District Court Order.....A

STATE OF MINNESOTA

IN SUPREME COURT

A05-768

State of Minnesota,

Respondent,

vs.

Eric Maynard Schwichtenberg,

Petitioner.

ORDER

Based upon all the files, records and proceedings

herein,

IT IS HEREBY ORDERED that the petition of Eric Maynard Schwichtenberg for further review be, and the same is, denied.

Dated: May 16, 2006

BY THE COURT:

Russell A. Anderson Chief Justice

ANDERSON, G. Barry, J., took no part in the consideration or decision of this case.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.
Eric Maynard SCHWICHTENBERG, Appellant.

No. A05-768.

Feb. 28, 2006.

Review Denied May 16, 2006.

Blue Earth County District Court, File No. CR-04-2346.

Mike Hatch, Attorney General, St. Paul, MN; and Ross E. Arneson, Blue Earth County Attorney, Patrick R. McDermott, T. Keith Russell, Assistants County Attorney, Mankato, MN, for respondent.

Samuel A. McCloud Carson J. Heefner, Shakopee, MN, for appellant. Considered and decided by WRIGHT, Presiding Judge; DIETZEN Judge; and WORKE, Judge.

UNPUBLISHED OPINION

DIETZEN Judge.

*1 Appellant challenges his conviction of refusal to submit to testing under Minn.Stat.§160A.20, subd.2, arguing that the statute is unconstitutional because it criminally penalizes appellant for exercising his constitutional right to withhold consent to a search, i.e., a breath test, when law enforcement has no warrant to take the test. Because we conclude that the statute is constitutional, and the lack of appellant's verbal consent to the taking of the breath test did not violate his Fourth Amendment rights, we affirm.

FACTS

In July 2004, appellant Eric Maynard Schwichtenberg was arrested for driving under the influence. He was taken to the Blue Earth County Law Enforcement Center where he was read the implied consent advisory. He declined the opportunity to speak to an attorney, initially agreed to take a breath test, and then refused consent. Appellant was charged with second-degree refusal to submit to testing, in violation of Minn.Stat.§169A.20, subd.2 (2004) and third-degree driving while impaired, in violation of Mnn.Stat.§169A.26, subd.1 (2004). After a contested omnibus hearing in October 2004, the district court denied appellant's

motion to suppress all evidence based on an illegal search or seizure, or alternatively, because section 169A.20, subdivision 2, is unconstitutional. Following a stipulated-facts trial pursuant to Minn.R.Civ.P. 26.01, subd. 3, and State v. Lothenbach, 296 N.W. 2nd 854 (Minn.1980), appellant was found guilty of second-degree refusal to submit to testing. The district court sentenced appellant to 180 days in jail, stayed execution of 150 days, and imposed 30 days in jail. This appeal follows.

DECISION

On appeal, appellant contends that section 169A.20, subdivision 2, is unconstitutional. The constitutionality of a statute is a question of law, which we review de novo. Hamilton v. Comm'r of Pub. Safety, 600 N.W.2d 720, 722 (Minn.1999). A statute is presumed constitutional, and "will not be declared unconstitutional unless the party challenging it demonstrates beyond a reasonable doubt that the statute violates some constitutional provision." Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn.1979).

The Fourth Amendment to the United States Constitution, and article I of the Minnesota Constitution provide protection against

unlawful searches and seizures. U.S. Const. Amend. IV; Minn. Const. art I §10Warrantless searches are presumed to be unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 454-56, 91 S.Ct. 2022, 2032, 29 L.Ed. 564 (1971); Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed. 777 (1964); United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951). Consent is an exception to the warrant requirement under the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed. 854 (1973).

Minn.Stat.§169A.20, subd.2 provides that "[i]t is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.52 (test refusal or failure; revocation of license)." Appellant does not challenge the constitutionality of the statute as a violation of his right against self-incrimination or right to privacy, but argues that the statute unconstitutionally penalizes him for exercising his constitutional right to withhold verbal consent to a warrantless search.

*2 In Schmerber v. California, the United States Supreme Court held that the withdrawal of blood from a suspected drunk driver without a warrant, if conducted in a reasonable manner after being arrested, was not inadmissible on the grounds that it violated his Fifth Amendment right against self-incrimination and Fourth Amendment right against unreasonable searches and seizures. 384 U.S. 757, 771-72, 86 S.Ct. 1826, 1836, 16 L.Ed. 908 (1966).. The Court determined that once the privilege against self-incrimination was found not to bar compelled intrusions into the body to determine alcoholic content, the Fourth Amendment's proper function is to determine whether the intrusion was justified, or made in an improper manner. Id. at 768, 86 S.Ct. at 1834. In State v. Mellett, this court held that Minn.Stat.§169A.20, subd.2 did not violate a defendant's right against self-incrimination, right to privacy, or Fourth Amendment rights. 642 N.W.2d 779, 784-85 (Minn.App.2002), *review denied* (Minn. Jul. 16, 2002). The Mellett court observed that the legislature has a "compelling

state interest in protecting state residents from drunk drivers, and an important part of the implementation of that interest is the testing of those whom officers have probable cause to believe have been drinking and are driving while impaired...." Id. at 784. Appellant nonetheless argues that Mellett did not address the precise issue he raises, i.e., that it is a violation of the Fourth Amendment to criminalize the refusal to submit to a chemical test, because it did not analyze consent as an exception to the Fourth Amendment prohibition against warrantless searches. We disagree. In Mellett, this court observed, "[a]t oral argument, appellant asserted that Schmerber supports her claim that criminalizing the refusal to submit to chemical testing violates the Fourth Amendment." Id. at 785. Rejecting appellant's argument that Schmerber provided the only constitutional remedy to enforce the driving-while-intoxicated statutes, the Mellett court noted that the legislature was free to enact other procedures. The Mellett court concluded, "we defer to the

legislature's judgment and hold that the refusal statute does not violate appellant's Fourth Amendment rights." *Id.*

We conclude that the holding of Mellett is dispositive of appellant's contentions. The state has a compelling interest in protecting its residents from drivers impaired by alcohol, and the statutory framework of implied consent set forth in Minn.Stat. §169A.20, subd.2, is a reasonable means to accomplish that objective. Consequently, the statute is constitutional, and the lack of appellant's verbal consent to the taking of the breath test did not violate his Fourth Amendment rights.

Affirmed.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF BLUE EARTH

FIFTHY JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

VS.

Eric Maynard Schwichtenberg,

Defendant.

PREFACE

This matter came on for hearing before the Court on October 19, 2004, at the Blue Earth County Courthouse, Mankato, Minnesota.

The plaintiff was represented by Keith Russell, Attorney at Law. The defendant appeared personally and was represented by Samuel McCloud, Attorney at Law.

The purpose of the hearing was to hear defendant's challenge to the constitutionality of the implied consent advisory.

Based upon the evidence presented at the hearing, and upon the additional submissions of the parties and the contents of the file, the Court makes the following:

ORDER

IT IS ORDERED, as follows: the defendant's motion is denied.

Dated: January 7, 2005.

Memorandum

FACTS

On July 24, 2004, patrons of a bar in Mapleton informed Officer Officer Belgard that two intoxicated individuals just left the bar in a white pick up truck. Officer Belgard located the vehicle, which the defendant was driving, and called Officer Ronsey to inform him of the complaint. Officer Honsey approached the passengers and immediately smelled a strong odor of alcohol. He then administered field sobriety tests, which the defendant failed or performed unsatisfactorily. The defend<L'"1t refused to submit to a PBT, and Officer Ronsey al-rested him for driving while impaired. Once at the Law Enforcement Center, Officer Honsey read the defendant the Implied Consent Advisory _

The defendant declined to telephone an attorney and refused to take a test although Officer Honsey advised the defendant that test refusal was a crime.

ANALYSIS

The defendant challenges the constitutionality of the Implied Consent Advisory. Under Minnesota law, it is a gross misdemeanor to refuse to submit to a chemical test of the person's blood, breath, or urine where an officer has probable cause to believe that the individual has been driving, operating, or in physical control of a motor vehicle while impaired. Minn.Stat. §169A.20, Subd, 2; Minn. Stat. §169A.52. The Minnesota Motor Vehicle Implied Consent Advisory informs individuals suspected of operating a motor vehicle while

under the influence that Minnesota law requires that the individual take a test to determine whether they are under the influence of alcohol and that refusal to take a test is a crime. The Advisory also explains that the individual has the right to consult with an attorney before making the decision about testing. Minnesota statutes are presumed constitutional and should be declared unconstitutional only when necessary. State v. Machholz, 574 N.W.2d 415, 419 (Minn. 199B). The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute is unconstitutional. *Id.*

The defendant first asserts that the Implied Consent Advisory violates Due Process because it is inadequate and misleading by failing to inform the driver that test refusal is

a gross misdemeanor and can impose more severe penalties than one consents to testing. However, The failure of the advisory to warn of every possible consequence does not violate fundamental fairness inherent in due process ... Likewise, due process does not require that the advisory explain every potentially unclear application of the law. Catlin v. Commissioner of Public Safety, 490 N.W.2d 445, 447 (Minn.App.1992) The Advisory notifies drivers that refusal is a crime and affords the opportunity to contact an attorney if they require additional clarification as to the exact consequences. Indeed,

> An accurate assessment of the precise consequences of alcohol-concentration test refusal or test failure involves a degree of legal analysis that depends on an application of the laws

> to the unique driving record
>
> of the arrested person. This
>
> is the domain of the attorney
>
> and is beyond the scope of the
>
> law enforcement officer's function.

Fehler v. Commissioner of Public Safety, 591 N.W.2d 752, 754 (Minn.App.1999)

The defendant also asserts that Minn.Stat. §169A.20, Subd. 2, violates the defendant's Fourth Amendment right against unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, substantive due process, and the right to privacy The issue of whether the Implied Consent Advisory violates a driver's Fourth Amendment right against unreasonable searches and seizures has already been decided. In State v. Mellett, the Court of Appeals deferred to the legislature's

judgment and held that the refusal statute does not violate a driver's Fourth Amendment rights. State v. Mellett, 642 N.W.2d 779, 785 (Minn.App. 2002).

In addition, the Implied Consent Advisory does not violate the defendant's Fifth Amendment right against self-incrimination. The Minnesota Supreme Court has already determined that the refusal statute does not violate a defendant's right against self-incrimination stating,

> [W]here an individual is requested to submit to blood alcohol content testing and potentially faces criminal penalties for refusing to do so, and where that individual is provided a reasonable opportunity to consult

> an attorney before deciding whether
>
> or not to submit as requested-.
>
> neither the state nor the federal
>
> privilege against compelled self-
>
> incrimination is violated.

McDonnell v. Commissioner of Public Safety, 473 N.W.2d 848, 856 (Minn.App.1991).

Although the wording of the statute has changed in recent years, this principle still applies.

Moreover, the Implied Consent Advisory does not violate substantive due process. when a statute is challenged on substantive due process grounds, courts use the following test: "When a statute does not involve a suspect classification and does not infringe on a

fundamental right, it need only be rationally related to a legitimate governmental purpose in order to withstand a substantive due process challenge. Hawes v. 1997 Jeep Wrangler, 602 N.W.2d 874, 880 (Minn.App.1999). Because this statute does not involve a suspect class, the above test applies. Certainly, protecting residents from drunk drivers and reducing drunk driving are legitimate government purposes rationally related to testing those drivers whom officers have probable- cause to believe have been operating a motor vehicle while under the influence. See: Mellett,642 N. W. 2d at 784.

Finally, the Implied Consent Advisory does not violate the defendant's right to privacy. In State v. Mellett,the Court of Appeals stated

> [B]ecause tbe legislature has a compelling state interest in protecting residents from drunk drivers, and an important part of the implementation

> of that: interest is the testing of those whom officers have probable cause to believe have been drinking and are driving while impaired, that balancing test favors intrusion by the state on privacy rights held by [a driver] ,

The defendant has failed to establish beyond a reason doubt that the refusal statute is unconstitutional. Therefore, defendant's motion is denied.